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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 293

IN RE RAYMOND K. COOPER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

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IN THE

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No. .....

IN RE RAYMOND K. COOPER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

Petitioner, Applicant for trademark in Court below, prays that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals, entered in the above entitled case, decided April 14, 1958. Rehearing denied May 23, 1958.

OPINIONS OF THE COURT BELOW.

The opinion of the United States Court of Customs and Patent Appeals involved herein is reported in 117 USPQ at page 297. Only four members of the Court of Appeals sat, and Judge Worley dissented from the majority opinion. Petition for rehearing was denied May 23, 1958.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of the Court is invoked under Title 28, U. S. C. 1256, to review a decision of the Court of Customs

and Patent Appeals affirming a determination by the Board of Appeals of the Patent Office declining to allow a trademark registration.

QUESTION PRESENTED.

The question involved is whether a party may have any protection whatever to cover an arbitrary title of a book either by way of trademark registration, or by way of copyright registration.

STATUTE INVOLVED.

The Trademark Act of 1946, Section 2 and Section 45, commonly known as the Lanham Act.

CONSTITUTION OF THE UNITED STATES.

Section 1, Article VIII of the Constitution of the United States.

STATEMENT OF CASE.

The petition relates to the use of an arbitrary name in connection with a book.

A trademark registration was filed on September 28, 1953, Serial No. 653,815, for a trademark for books (not a continuing series).

An appeal was filed in the United States Patent Office on August 29, 1955 from the final rejection of the Examiner dated June 10, 1955.

The rejection appears to be based on the premise of whether or not books (not in series) may have the name of title, which is an *arbitrary* word, registrable as a trademark. The decision of the Commissioner of Patents, dated July 25, 1956, affirms the decision of the Trademark Examiner.

The sole question, therefore, appears to reside in whether

an *arbitrary* word may be used as a trademark for books in the same manner in which the same trademark could be used for ordinary commodities, such as fruits, canned goods, shoelaces, locomotives, etc.

The Copyright laws do not give the author protection on the title of copyrighted works, and the Patent Office will give no protection at all on the name of the book.

Trademark Act of 1946 Entitles Applicant to Registration.

A user of a name or mark, regardless of the commodity, is entitled to trademark registration under the Act of 1946, providing such mark does not fall within the prohibitions set forth in Section 2.

Section 2 of the Trademark Act of 1946 provides that: "*No trademark* by which the goods of the applicant may be distinguished from the goods of others *shall be refused* registration on the principal register on account of its nature, unless it"—falls under the express prohibitions enumerated in paragraphs (a), (b), (c), (d), or (e). (Emphasis added.)

In this present case, applicant's goods are books, and the Trademark Act of 1946 states that *no* trademark *shall be refused*, unless it falls within the prohibitions of (a), (b), (c), (d), or (e) of Section 2 of the Trademark Act.

The mark of the application does not fall within those prohibitions of the Act of 1946.

A party dealing in books, like a party dealing in any other kind of goods, should be entitled to protection of some kind.

The Examiner holds that the applicant *may not* have protection on the name or mark of his book, because there is no other way in asking for the book. That same kind of reasoning would be true with respect to any other goods, or to commodities such as canned beans, oranges, or what not.

The Copyright Laws Do Not Protect a Title.

The copyright laws *do not* give any protection on the name or title of a book.

If the Copyright Act does not grant the owner any protection on the name or title of his book, and the Patent Office will not grant any protection on the name or title of his book, then the applicant is without recourse even under the Constitution of the United States, which provides that patentees and authors *shall* be entitled to *protection* on their respective works, Section 1, Article VIII.

Names of Games Are Registrable.

The Patent Office does register trademarks for names or titles of *games*, which appears to be inconsistent with its holding that names or titles of books are not registrable. Innumerable names for games have been registered by the Patent Office, including the following:

PARCHEESI—Registration No. 123,033, registered October 8, 1918, for board and counter games, in Class 22, Games, toys, and sporting goods. Renewed October 8, 1938; republished September 14, 1948. Affidavits under Sections 8 (a) and 15 accepted and received December 1, 1953.

BINGO—Registration No. 398,639, registered November 10, 1942, for Bingo pads and cards, in Class 22, Games, toys, and sporting goods.

TACTICS—Registration No. 381,483, registered September 24, 1940, for Games—namely, board games, cards, and playing pieces, Class 22, Games, toys, and sporting goods.

INDIAN CHECKERS—Registration No. 371,927, registered October 17, 1939, for checker games, Class 22, Games, toys, and sporting goods.

TIDDLE TENNIS—Registration No. 362,819, registered November 29, 1938, for table game, similar to table

tennis except that small disks are snapped back and forth over a net with paddle shaped pieces, Class 22, Games, toys, and sporting goods.

GALLOPING DOMINOS—Registration No. 345,654, registered May 4, 1937, for coin operated game device, Class 22, Games, toys, and sporting goods.

MONOPOLY—Registration No. 326,723, registered July 30, 1935, for board game played with movable pieces, Class 22, Toys, games, and sporting goods. Affidavit under Section 8 accepted and Affidavit under Section 15 received September 30, 1953.

STADIUM CHECKERS—Registration No. 602,125, registered February 15, 1955, for game consisting of a specially designed playing wheel and ball-shaped movable pieces, Class 22, Games, toys, and sporting goods.

CANASTA—Registration No. 557,252, registered April 8, 1952, for coin-controlled amusement game apparatus in which a ball is projected upon an inclined playing surface, Class 22, Games, toys, and sporting goods.

TIDDLE . TAC . TOE—Registration No. 632,174, registered August 7, 1956, for game employing playing chips, a board including receptacles for such chips, and chip means for projecting said playing chips into said receptacles, Class 22, Games, toys, and sporting goods.

It is believed that names of games fall *exactly* within the same category as names for books and, therefore, if names of games are registrable, names of books are likewise registrable.

Prior Decisions Cited.

It is conceded that there are decisions which hold that the name or title of a book may not be registered as a trademark. The earlier cases hold that a name may not be registered as a trademark, because protection *is given* under the copyright laws. Therefore, if *no* protection is

granted under the copyright laws, then there should be some law or right which *would* grant protection for the name or title of a book.

Later cases hold that a title of work may be used by anyone, whether the book *is* copyrighted *or not*. This is the holding of *Martenet* v. *United Artists Corp.*, 62 USPQ 148; 56 F. Supp. 639.

The trademark statute Act of 1946, Section 2, provides that if it is possible to *distinguish* the goods of applicant from others, it should *not* be refused registration.

Citations.

In the case of *In re The Page Company*, decided December 3, 1917, 247 O. G. 246; 1918 C. D. 136; 47 App. D. C. 195, Judge Van Orsdel of the Court of Appeals of the District of Columbia, involving the word "Pollyanna", stated on page 136 C. D. 1918, as follows:

> "It is the name of a particular book, and the public has no way of describing the book but by the use of the name. Undoubtedly, a trade-mark may be registered for a series of literary publications, but it must be arbitrary, and not merely the name of any one or more of a series. The rule is well illustrated in the note by Mr. Rowland Cox to *Clemens* v. *Belford* (14 Fed. Rep. 728; Cox, Manual, 685), quoted with approval in Hopkins on Trade-Marks (page 85), as follows:
>
> > 'Thus the term "Old Sleuth Library" was distinctly arbitrary, and never the name of a particular book or literary production, and for this reason it was in an accurate sense a trademark, and must continue to be as long as the publication was continued. But if the publication of the periodical were discontinued for a period of years, the name would cease to be arbitrary and take its place in literature as indicating a definite collection of articles, pictures, etc., and as soon as it acquired the settled meaning, it would, in the absence of copyright, become *publici juris*.'

"The trade-mark law is not intended to conflict with or extend the operation of the copyright law. If a copyright is taken for a book or particular publication, the owner of the copyright enjoys the exclusive right to the use of the name as long as the copyright continues; but when it expires, the privilege expires and the use of the descriptive name becomes *publici juris*. In the Britannica case (*Black et al. v. Ehrich et al.*, 44 Fed. Rep. 793), Judge Wallace stated the rule after expiration of copyright, as follows:

> 'Neither the author nor proprietor of a literary work has any property in its name. It is a term of description, which serves to identify the work; but any other person can with impunity adopt it, and apply it to any other book, or to any trade commodity, provided he does not use it as a false token, to induce the public to believe that the thing to which it is applied is the identical thing which it originally designated. If literary property could be protected upon the theory that the name by which it is christened is equivalent to a trade-mark, there would be no necessity for copyright laws.'

"Clearly, the word 'Pollyanna', being the title of the first volume of the series, is descriptive, and, as such, unregistrable."

According to this "Pollyanna" decision, if it does not says so emphatically, it does give an exceedingly strong implication, that "the owner of the copyright enjoys the exclusive right to the use of the name as long as the copyright continues" (page 137).

In the case of *Ex parte Delano*, 45 USPQ 361, registration was sought as applied to a series of charts and it was refused as descriptive. The applicant adopted and used the mark "as the title for a chart or print on handwriting, which will be published from time to time". The decision by Assistant Commissioner Frazer quoted the Examiner as follows:

"The mark, which is admittedly the title of a publication, has been refused registration for the reason that such publication appears to be of an individual character and not a periodical publication which alone can support trade mark use in a title."

The final holding in this case, however, was that "none of which titles was even remotedly simulated by the trade mark'."

In *Martenet v. United Artists Corporation*, District Court, S. D. New York, 62 USPQ 148; 56 F. Supp. 639, the plaintiff sought an injunction *pendente lite* to restrain the use of the title "*Voice in the Wind*" by the defendant corporation who is a distributor of a motion picture film bearing that name. Plaintiff is the author of a novelette entitled "*Voice in the Wind*", which was previously published and copyrighted by McCall's Magazine in its August 1942 issue. The action was brought for a permanent injunction and for an accounting. Only the titles were identical, the novelette and the film telling different stories.

The Court held, on page 640, 56 F. Supp., that an author or proprietor of a literary work has no property in its name as it is merely a description which serves to identify the work, and anyone may use it unless fraud is intended.

In *Ex parte Simmons-Boardman Publishing Corporation*, 612 O. G. 790; 77 USPQ 660, Assistant Commissioner Daniels refused to grant the registration of a mark consisting of the words "Locomotive Cyclopedia" as a trademark, under the Act of March 19, 1920, and cites that the title of a book is not a trademark and cannot be registered. He cites the cases of *In re The Page Company*, 47 App. D. C. 195, 1918 C. D. 136; *Martenet v. United Artists Corporation*, 56 F. Supp. 639, 62 USPQ 148; *Ex parte Nicholas Delamo*, 514 O. G. 834, 45 USPQ 361.

He states that that case, however, is not a situation in which a trademark appears on a number of books having

different titles such as that involved in *Whitman Publishing Company* v. *McLoughlin Bros., Inc.*, 97 F. 2d 608; 38 USPQ 120. He concludes that *the words "LOCOMOTIVE CYCLOPEDIA"* are *a generic* name of a book, "even though a series of such volumes have been and may be published."

Certainly "Locomotive Cyclopedia" is not an arbitrary name or mark which is registrable under the 1920, or any other Act.

In *Whitman Publishing Company* v. *McLoughlin Bros., Inc.*, 497 O. G. 278; 97 F. 2d 608; 38 USPQ 120, the mark in question was "The Big Little Book" for a series of books published from time to time. This case, decided by the Court of Customs and Patent Appeals, was decided June 27, 1938 in an opinion written by Judge Garrett, presiding judge. This case involved many complications including the doctrine of "unclean hands" and many other things; and the Court held that the mark was registrable.

It is believed that this *Whitman* case affirmed the Commissioner of Patents wherein the Commissioner of Patents commented on a decision of the Examiner of Interferences.

The Commissioner, after first holding it to be immaterial, in his opinion, whether appellee made the additions to the text of the editions issued by appellee in 1934, said:

> "*I can perceive no reason why a trade mark may not properly be applied to a book,* or to a complete collection of books, *just as it may be applied to a serial publication, or to any other article of merchandise.* It is true, of course, as was held in the case of *In re The Page Co.*, 47 App. D. C. 195, that the title of a particular book may not also function as a trade mark for that book, or for a set or series in which it is included; but that situation is not presented here. As already noted, each of appellant's books bears its individual title, and it is not suggested that any of these titles is even remotely simulated by the trade mark. (Emphasis added.)

"Nor am I able to agree with the Examiner of Interferences that the mark has become 'the title to the printed publication' simply because the series of books may be considered complete. From that holding it would necessarily follow that upon the completion of any series, or upon the suspension of its publication, a registered trade mark under which the books of the series had been sold would become invalid, and its registration would be subject to cancellation. In fact that would be the status of appellee's mark, which the decision states is registrable, in the event appellee should decide to add no more to those already published. To my mind such doctrine is clearly unsound. *I think that trade mark ownership in a mark applied to books depends upon exactly the same consideration as those by which the question of ownership is determined with respect to marks applied to any other merchandise. I can find no justification, either in law or in reason, for applying a different rule.* (Emphasis added.)

"Appellant has been using its mark, on the goods specified in its application, continuously since 1928. The date of first use claimed by appellee is December, 1932. In the view I take of the case appellant is, therefore, entitled to an award of priority.

"In the case of *In re Page Company*, 47 App. D. C. 195, the court held that a trade mark may be registered for a series of literary publications, *but that such mark must be arbitrary*, and not merely the name of any one or more of the series, the reasoning being that the name or title is clearly descriptive, the public having 'no way of describing the book but by the use of the name.' Also, it was there held that 'The *trade mark law* is not intended to *conflict* with or extend the operation of the *copyright law*'. (Emphasis added.)

"*We find ourselves in agreement with the reasoning of the Commissioner of Patents in this case.*" (Emphasis added.)

Judge Garrett thereupon affirmed the Commissioner of Patents.

The case of *Ex parte Reinhold Publishing Corporation*, 585 O. G. 649; 68 USPQ 401, concerned the words "The Condensed Chemical Dictionary", which were refused registration under the 1920 Act for a "dictionary published from time to time."

Assistant Commissioner Frazer, who wrote this decision, stated that the mere name of an article of commerce is not registrable as a trademark and, of course, such a statement, where the mark is *arbitrary*, is unfounded and inaccurate because *arbitrary* names given to goods and articles, when they are not generic or geographical and comply with the Trademark Act of 1946 (The Lanham Act), and are not subject to the prohibitions set out in paragraphs (a), (b), (c), (d), and (e) of Section 2 of the Act of 1946, *are* registrable as trademarks.

Page 47 of Howell's "The Copyright Law", Second Edition, page 47, cited by the Examiner, states that the titles or names may in some cases qualify for registration as trademarks, *especially* as applied to periodicals or a series of cartoons and the like, but without thereby extending the term of copyright in the work itself.

This decision, therefore, would indicate that titles or names would qualify for registration; otherwise, the word "*especially*" would not be required.

In the Atlas case mentioned in Howell's, *supra*, it merely states further that *Smith and Street* lost out on their registered trademark "Nick Carter" on certain technical grounds.

The periodical mentions a dissent by one of the judges who states that: "The defendants" he said, "are engaged in appropriating the fruits of plaintiff's current endeavors, and are deceiving the public."

It would appear, therefore, that the appropriation of a title, which the copyright laws permit, the fruits of plain-

tiff's endeavors have been appropriated, and the public is being deceived.

This statement in Howell further states that "Dr. Eliot's Five-Foot Shelf of Books" constitutes a valid trademark. Under this decision, it would appear that "TEENY-BIG" would constitute a valid trademark.

Other Pertinent Cases.

Other cases relating to trademarks for books are the "MARK TWAIN" case, *Clemens* v. *Belford, Clark & Co.*, 14 Fed. 728, and the case of *Black, et al.* v. *Ehrich, et al.*, 44 Fed. 793. In the "MARK TWAIN" case, the plaintiff Clemens operated under the *nom de plume* "MARK TWAIN". The defendant put out a book entitled, "Sketches by Mark Twain". The entire sum and substance of this case resides in the fact that inasmuch as the works put out under the assumed name, "MARK TWAIN", and the works of Clemens were *not copyrighted*, Mark Twain dedicated such matter to the public, stating, on page 732, that "the public are entitled to use it in such form as they may thereafter choose, and to quote, compile, or publish it, as the writing of its author."

The main holding in the case was that an author operating under a *nom de plume* has no more rights than an author who writes under his full given name.

In the case of *Black, et al.* v. *Ehrich, et al.*, 44 Fed. 793, a suit was brought to restrain the defendants, who are doing business in New York, from selling a work entitled, "The Encyclopaedia Britannica", which was published by Messrs. R. S. Peale & Co. It was held in this case that "With the exception of the copyrighted articles, *the entire literary matter* of 'The Encyclopaedia Britannica, Ninth Edition,' *is public property* in this country, at least, and a rival publisher has the legal right to make any use of it he

sees fit. He may use any part of it, or all of it, and call it by what name he prefers."

Also, on page 794, the Court states, "If literary property could be protected upon the theory that the name by which it is christened is equivalent to a trademark, *there would be no necessity for copyright laws.*" (Emphasis added.)

Each one of these latter cases, in theory, holds that protection is granted under the copyright laws. The later cases, however, appear to hold that *such is not a fact*. And if such is not the fact, then the author, publisher, or other person, has no protection against pirating his name.

The copyright laws grant no protection on a name.

The Patent Office will not register the name as a trademark.

Therefore, it appears to be a violation of Section 1, Article VIII of the Constitution of the United States.

Section 1, Article VIII of the Constitution of the United States of America, provides that the Congress shall have the power to promote the progress of science and the useful arts, by securing for limited times to authors and inventors *the exclusive right* to their respective *writings* and discoveries.

ARGUMENT.

In the above cases, it appears to be the consensus of opinion that if a book or other works is copyrighted, then protection *is* granted under the copyright law. The other and later cases appear to hold that the name or title of a book is *not* protected by copyright. In the case of *In re The Page Company*, C. D. 1918, page 136, Judge Van Orsdel, in the "Pollyanna" decision, appears to hold that the owner of the copyright enjoys the exclusive right to the use of the name *so long as* the copyright continues.

However, Judge Mandelbaum, in the case of *Martenet v. United Artists Corporation*, 56 F. Supp. 639, holds on page 640 that an author or proprietor of a literary work has no property in its name, stating:

> "(1) It has been held that an author or proprietor of a literary work has no property in its name, (Copyright Act, §§1 (a, b), 4, 17 U. S. C. A. §§ 1 (a, b), 4), and that it is merely a term of description which serves to identify the work (*Atlas Mfg. Co.* v. *Street & Smith*, 8 Cir., 204 F. 398, 47 L. R. A., N. S., 1002), and anyone may use it, unless some fraud is intended. No such claim is made here. Therefore, the only right to damages plaintiff may have would arise from any possible secondary meaning in the title, resulting in confusion to the public. See *Becker* v. *Loew's, Inc.*, 7 Cir., 133 F. 2d 889."

As quoted above, the Court states that the only right to damages plaintiff may have would arise from possible secondary meaning in the title, resulting in confusion to the public.

Therefore, confusion would amount to unfair competition, and unfair competition merely being a broader phase of the trademark law, there is no reason why the arbitrary

title or arbitrary name of a book should not come under the more specific form of unfair competition; namely, trademark infringement.

Also, in the case of *Ex parte Delano*, 45 USPQ 361, Assistant Commissioner Frazer, in trying to overcome the statement that the *Page* case was repudiated by the Court of Appeals in the *Whitman* case (97 F. 2d 608), states that the two cases are distinguishable and he, therefore, affirmed the Examiner of Trademarks.

It is believed that the correct law, as set forth in the *Whitman* case, and approved and quoted by Chief Judge Finis Garrett of the Court of Customs and Patent Appeals, is, and should be, controlling. It is to be noted that the statements made by Judge Garrett in *quoting* the Commissioner of Patents on page 611, said:

> "I can perceive no reason why a trade mark may not properly be applied to a book, or to a complete collection of books, just as it may be applied to a serial publication, *or to any other article of merchandise.*" (Emphasis added.)

Also, the Court of Customs and Patent Appeals, by Chief Judge Garrett, *again quoting* the Commissioner of Patents, states on page 611 (97 F. 2d 608) (38 USPQ page 123):

> "* * * I think that trade mark ownership in a mark applied to books depends upon exactly the same consideration as those by which the question of ownership is determined with respect to marks applied to any other merchandise. I can find no justification, either in law or in reason, for applying a different rule."

If books are goods, and they certainly are goods, the applicant is entitled to registration of an arbitrary name under Section 2 of the Trademark Act of 1946.

Also, applicant is entitled to protection of some kind, under Section 1, Article VIII of the Constitution.

Trademarks should be granted on books like any other commodity or goods.

Books like games certainly are goods.

If games are registrable, and they are, books also should be registrable.

If a thousand copies of a book are printed, why should there be a difference in such a case over a thousand different editions of one copy each being published?

To say that there is no other way of asking for a book than by its title, does not appear to be sound and logical because the same is true of any goods or commodity. If a person should ask for a book—and there are millions of books—the next question would be, "What book do you want?", and the answer would be, "TEENY-BIG".

There is no other way of asking for a game than by the name of the game. Therefore, if one asks for the game "Canasta", he would get the game "Canasta". Why may not he ask for a game, the name of which could be "Teeny-Big"? By the same token, should he ask for the book "TEENY-BIG", he should be able to get the book "TEENY-BIG".

It appears to be a fallacy on the part of the Patent Office to register some things and not others. Games are so closely allied to books that there is no distinction whatever.

In the same vein, if somebody asked for an orange or a dozen of oranges, the grocer would say, "What kind of oranges do you want?" and, if "Sunkist" oranges were wanted, they would reply, "Sunkist" oranges.

If a purchaser would say, "I want some canned beans", he would be asked, "What kind of canned beans do you want?" He would reply by saying, "Libby's", "Heinz" or whatever other make he wants.

If a purchaser should say "I want the game 'Canasta'

or 'Parcheesi', or 'Tactics' ", that is what the salesperson would hand him. Therefore, should the purchaser ask for a "TEENY-BIG" book, that is what the salesperson would give him. There is no distinction between games, books, or any other commodity.

It does not seem to make any difference whether the goods be books, games, golf clubs, riding saddles, oranges, candy, canned goods, or any other item.

There are perhaps more oranges sold in any one year than there are books, and even though the owner of the "Sunkist" trademark may or may not have written article copyrighted, of which the title would be "Sunkist Oranges", neither the Patent Office, the Courts, nor any one else would feel that "Sunkist" does not designate a particular brand of orange. The same is true with prunes, coffee, guns, bread, fish rods, condiments, or anything else. The same is true in regards to games. It should be true with respect to books.

Should one want to buy shoes, and there are various brands of shoes, a particular brand of shoe would be asked for such as "Slater's", "I. Miller", "Delman", "Palter DeLiso", etc. If one wanted to buy shoes of Julius Garfinkel in Washington, it would, firstly, be necessary to know whether the shoes were for children or adults. Secondly, it would be necessary to determine whether the shoes would be for men or women. Thirdly, it would be necessary to determine the brand of the shoe required.

There is no question but that shoes may be registered as a trademark.

There is no question but that games may be registered as a trademark.

Therefore, why should a question arise as to whether a trademark may be had for a book?

Why should a single book be differentiated from a single

orange or from a series of books as a book from a game? There appears to be no valid reason.

Of course, there are cases, and there are reasons, why a title to a book is the only way in asking for it, such as "The Life of Abraham Lincoln", or "The Biography of George Washington", but such titles are not *arbitrary* marks. Everyone has the right to write a biography of a well-known deceased or historical person, but it is submitted that no one has the right to use the coined selected arbitrary words "TEENY-BIG" as a mark, name or title. The biographies of historical persons do not fall within the category of arbitrary names or marks. The word "Potatoes" may not be protected for potatoes but "Zippo" may be a valid trademark for potatoes or cigar lighters. "Zippo", like "TEENY-BIG", being an *arbitrary* word for the goods or commodity by which the public designates the product to indicate the origin.

The early decisions appear to rest on an erroneous implication or assumption that trademarks may be had only on a series of continuing periodicals, and principally, because such periodicals had been copyrighted. But, if the copyright laws grant no protection, and the trademark laws grant no protection, there is no protection whatever. One should be able to have protection on his books in the same manner as others have on other goods such as games, beer, whiskey, electric motors, steam engines, water spouts, and what not.

It is respectfully submitted that any prior holding that a single book may not be protected by a trademark, *is wrong*, and it appears that steps should be taken to *correct* this fallacy.

It is respectfully submitted, therefore, that a book, including thousands of copies, is in the same category as books published in series.

It is also further respectfully submitted that books are goods and, therefore, fall within the trademark laws.

It is further respectfully submitted that books fall within the identical category as games, and inasmuch as games are registrable, books too, should be registrable.

It is, therefore, respectfully requested that the prior decisions be reversed as to books, and that this Court take such steps as are necessary to correct the fallacy that a thousand copies of a single book is different from a thousand series of books, one book for each series.

It is further respectfully requested that the Court reverse the Commissioner of Patents and the Trademark Examiner, and cause registration of applicant's arbitrary trademark "TEENY-BIG" for books.

Respectfully submitted,

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JOHN A. MARZALL,
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APPENDIX

Opinion, Judgment and Rehearing Denied.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

In the Matter of the Application of Raymond K. Cooper.

October Term 1957.
Patent Appeal No. 6329.
Patent Calendar No. 37.
Serial No. 653,815.

RICH, *Judge*.

The sole question raised by this appeal is whether an arbitrary, that is to say coined, term which is the title of a book, and the only designation the book has, is registrable as a trademark for books under the Trademark Act of 1946, also known as the Lanham Act.

FACTS.

September 28, 1953, appellant applied for the registration of TEENY-BIG as a trademark for books, in Class 38, on the Principal Register under the Act of July 5, 1946, alleging first use and use in "commerce" on July 1, 1953. The specimen filed with the application appears to be the jacket of a book, the front cover portion bearing at the top the words TEENY-BIG, underneath which is a picture and under the picture the statement "By R. K COOPER with Illustrations by Dorothy Ashbrook Hobson." On the portion which would wrap around the back of the book are printed the title and author's name. On the back portion is the usual blurb from which one may gather that the

work is a juvenile, that is to say a book for children, the principal character in which is a little elf with magic powers of self-expansion named Teeny-Big. It also appears that Raymond K. Cooper, the author and appellant here, Yale '22, is president of four large building and supply houses, grandfather of five and took "time out of his busy routine to capture within the covers of his new book the elusive spirit of childhood." In sum, the book contains a single story, the name of the story is TEENY-BIG, the title of the book is TEENY-BIG and the book has no other name, title, subtitle or any other designation except its generic name "book."

DECISIONS BELOW.

The Examiner of Trademarks refused registration "on the ground that the mark presented herein is merely the title of a book" and because "the author or proprietor of a literary work has no property in its name, which is merely a term of description which must be used in calling for the goods." Five decided cases and a text were cited as authorities.

Assistant Commissioner Leeds affirmed the decision of the examiner in an opinion published at 110 USPQ 325. Her reasons for refusing registration were essentially the same as those of the examiner but she made this concise statement as to her principal reason:

> *The* name which is *the only name* by which an article of merchandise may be identified—whether a book or any other—is not a trademark and is therefore not registrable. Since the subject matter of this application is the name and the only name by which the copies of applicant's book can be identified, it is not a trademark and is not registrable.

Appellant's Points.

It has so long been settled that the title of a book cannot be registered as a trademark, because it is not a trademark, that there has been some question in our minds as to whether the concurring decisions below should not be summarily affirmed with mere citation of some of the principal authorities. *In re Page Company*, 47 App. D. C. 195, alone would suffice. However, the apparent sincerity of appellant's arguments persuades us to a presentation of our views on the principal contentions which have been made and an explanation of the reasons why we believe the appellant's arguments to be unsound.

Wrong Question Asked.

At the outset, appellant misstates the question before us, asserting that it is "whether an *arbitrary* word may be used as a trademark for books in the same manner in which the same trademark could be used for ordinary commodities such as fruits, canned goods, shoe laces, locomotives, etc." This is *not* the issue, which is as we have stated it at the beginning of this opinion. No one has asserted that a word may not be *used* as a trademark for books or that there cannot *be* trademarks for books, in the form of a word or otherwise, or that trademarks for books cannot be registered under the Lanham Act. Appellant appears to assume that Teeny-Big has been used ***as a trademark*** for books in asking that it be registered, but that is what we have to decide. Nothing we say should be taken as implying that no trademark for books can be registered; but before there can be registration there must be a trademark and a trademark exists only where there has been trademark use.

STATUTORY PROVISIONS.

Appellant's first point, as briefed, is that the 1946 Act *entitles* him to registration. It is urged that TEENY-BIG is registrable by the express provision of Sec. 2 unless it falls within one of the prohibitions of that section and appellant contends that it does not.

Section 2, relied on by appellant, insofar as here pertinent provides:

> *Sec. 2. Trademarks registrable on the principal register.*
>
> No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—
>
> * * * * *
>
> (e) consists of a mark which, (1) when applied to the goods of the applicant is merely descriptive or deceptively misdescriptive of them, * * *; * * * (15 U. S. C. 1052).

The introduction clause and the quoted portion of subsection (e) are complementary and opposite sides of the same coin to the extent that a mark which is "merely descriptive" of the goods to which the applicant has applied it is not being used by him *as a trademark* for those goods and hence, in that use, *is not a trademark*. The decisions below are obviously predicated on Section 2 in holding TEENY-BIG unregistrable on the grounds (a) that it is not a trademark and (b) that it is the name of applicant's book.

To eliminate any possible doubt on the matter, we proceed on the understanding that the name of a thing is descriptive of it, for the sense in which the trademark law uses the term "descriptive" includes the names of things as well as qualifying expressions. In lay language the

name of a thing might be referred to as designative, as in the expression "red rose" the name "rose" is designative and the adjective "red" is descriptive, but trademark law lumps the names and the qualifying expressions in the descriptive category. Thus the names "orange," "bean" and "book" are clearly "descriptive" of oranges, beans and books respectively. Furthermore, such names are incapable of functioning as trademarks because they cannot distinguish the goods of one person from the goods of another.

Appellant asserts that his mark does not fall within any of the prohibitions of the Trademark Act, that he has complied with all of its provisions and apparently *assumes* that TEENY-BIG has been used by him as a trademark. We do not think this is an overstatement for at the beginning of the brief it is stated that "evidently the rejection of the application was based on the alleged premise that a valid trademark may not be had on the use of an arbitrary name *as a trademark* for books (not in series)" and the question is asked "what protection may he have when an arbitrary word or name is used *as a trademark* for his books?" (Emphasis ours.)

Appellant seems to be arguing that whenever an *arbitrary* term is applied to a commodity of commerce—which a book is, of course—it *ipso facto* becomes a trademark. For example, he says:

> The word "Potatoes" may not be protected for potatoes, but "Zippo" may be a valid trademark for potatoes or cigar lighters. "Zippo", like "TEENY-BIG", being an *arbitrary* word for the goods or commodity by which the public designates the product to indicate the orgin.

To this is coupled an argument, the main theme of the brief, as plausible as it is fallacious, which will best be under-

stood from the following selected passages, illustrative of many others:

> The Examiner holds that the applicant *may not* have protection on the name or mark of his book, because there is no other way in [sic] asking for the book. That same kind of reasoning would be true with respect to any other goods, or to commodities such as canned beans, oranges, or what not.
>
> • • • • •
>
> To say that there is no no other way of asking for a book than by its title, does not appear to be sound and logical because the same is true of any goods or commodity. If a person should ask for a book and there are millions of books—the next question would be, "What book do you want?", and the answer would be, "TEENY-BIG".
>
> • • • • •
>
> In the same vein, if somebody asked for an orange or a dozen of oranges, the grocer would say, "What kind of oranges do you want?" and, if "Sunkist" oranges were wanted they would reply, "Sunkist" oranges.
>
> If a purchaser would say, "I want some canned beans", he would be asked, "What kind of canned beans do you want?" He would reply by saying, "Libby's", "Heinz", or whatever other make he wants.
>
> • • • • •
>
> It does not seem to make any difference whether the goods be books, games, golf clubs, riding saddles, oranges, candy, canned goods, or any other item.

But it does make a difference. The purchaser of a book is not asking for a "kind" or "make" of book. He is pointing out which one out of millions of distinct titles he wants, designating the book by its name. It is just as though one walked into a grocery and said "I want some food" and in response to the question "What kind of food?" said, "A can of chicken noodle soup."

The fallacy in appellant's arguments resides in the comparison of the wrong terms. TEENY-BIG must be compared to "oranges" and "canned beans" *on the facts of this case*, and not to "Sunkist," "Heinz," and "Libby's." Obviously, to support our statement of what terms must be compared, it behooves us to show that TEENY-BIG is a descriptive name like "canned beans," rather than a trademark like "Sunkist" as assumed (but not proved) by appellant.

The key to this case is not the word "arbitrary," which appellant takes to be tantamount to a directive to register, but the true nature of the words TEENY-BIG. Man is a creative animal. By the labor of his hands he creates things and by the labor of his mind he creates thoughts which are woven together into the form of essays, reports, speeches, court opinions, stories and the like. Man is a verbal animal and each new thing brings into being before long a new name—hammer, wheel, wagon, automobile, airplane. Things found in nature are also named—oranges, beans. Language evolves adjectives like teeny and big and baked and some new things can be named without coining new words, for example tank truck.

Books, as articles of merchandise, have entered the marketplace in great quantities. As appellant says, there are millions of them. They proliferate in two ways. New copies of old books are constantly manufactured—"Hamlet," the "Holy Bible," "Webster's Dictionary" and J. K. Lasser's "Your Income Tax." But, as in the case we are dealing with, authors and their publishers are constantly producing *new* books, the contents of which are new ideas in different forms—new plays, new yarns, new attempts to recapture the elusive spirit of childhood. Each is a new thing, unique, which has to have a name and, speaking generally, its name will fall into one of two categories. In the first category is a name like "tank

truck" suggested above, composed of existing descriptive words or names, or other purely descriptive phrases such as "Furniture Repair and Refinishing" and "The Life of Abraham Lincoln." The second category contains the *new names* for new books, the ones appellant calls "arbitrary"—"Candide," "Leviathan," "Huckleberry Finn," "Arrowsmith," "Moby Dick," "Pride and Prejudice," to pick a few at random, names which give, prior to reading it, no indication of what is in the book. Of course there are also the intermediate names ranging through all shades of descriptiveness of the book's contents. But however arbitrary, novel or nondescriptive *of contents* the name of a book—its title—may be, it nevertheless *describes* the book. Appellant has nowhere attempted to answer the question, How else would you describe it—what else would you call it? If the name or title of a book were not available as a description of it, an effort to denote the book would sound like the playing of the game "Twenty Questions."

Appellant appears to argue that there is an inconsistency in registering as a trademark the name for a series of books and in not registering the title of a single book. We see no inconsistency. The name for a series, at least while it is still being published, has a trademark function in indicating that each book of the series comes from the same source as the others. The name of the series is not descriptive of any one book and each book has its individual name or title. A series name is comparable to the title of a periodical publication such as a magazine or newspaper. While it may be indicative, either specifically or by association in the public mind, of the general nature of the contents of the publication, it is not the name or title of anything contained in it. A book title, on the other hand, especially one which is coined or arbitrary, identifies a specific literary work, of whatever kind it may

be, and is not associated in the public mind with the publisher, printer or bookseller—the "manufacturer or merchant" referred to in the Trademark Act (Sec. 45, definition of trademark). If a title is associated with anything, it is with the author for it is he who has produced the literary work which is the real subject of purchase.

As TEENY-BIG is no more than the name of a book, its only name, it is not a trademark under the statute, Section 2. Hence, TEENY-BIG was properly refused registration. It is of no avail to point out that it was "arbitrary" because every newly coined name has that characteristic, for example "radio," "woofer," "tweeter" and "smog," a fact that tends to be forgotten as new nomenclature becomes a part of the language and new titles are added to the publishers' catalogs.

In saying that TEENY-BIG is the name of a book, we note that in this context the term "book" has a dual aspect. First, it is an article of manufacture which can be sold in the marketplace. As such it is not unlike blankbooks or pads of paper. Secondly, it contains, by virtue of the printing on the paper, an intellectual content which is incorporeal—the story. The title of the "book" does not really pertain to the first aspect at all but identifies, names or describes the incorporeal literary content, which is subject to the laws pertaining to literary property. Publishers, in short, are not in the blankbook business.

There is a compelling reason why the name or title of a book of the literary sort cannot be a trademark. The protection accorded the property right in a trademark is not limited in time and endures for as long as the trademark is used. A book, once published, is protected against copying only if it is the subject of a valid copyright registration and then only until the registration expires, so eventually all books fall into the public domain. The right to copy which the law contemplates includes the right to

call the copy by the only name it has and the title cannot be withheld on any theory of trademark right therein. As was aptly said in *In re Page Company*, 47 App. D. C. 195, when copyright in a protected work expires, "the use of the descriptive name becomes *publici juris*." The title there under consideration was "Pollyanna" which appears to be quite as "arbitrary" as TEENY-BIG. Of course, it makes no difference whether the work whose name is sought to be registered is copyrighted. If it is not, the public may copy it at once and would be as clearly entitled to call it by its name. If there were two publishers of "Pollyanna," how could the title possibly indicate origin or distinguish the goods of one from the goods of the other?

We have reviewed the opinion of Judge Garrett in *Whitman Publishing Company* v. *McLoughlin Bros., Inc.*, 25 C. C. P. A. (Patents) 1298, 38 USPQ 120, 97 F. 2d 608, so extensively quoted by appellant. We find it entirely consistent with what we have said in this opinion and with the result reached. Other cases which have held that the titles of books are mere names, and hence not trademarks are *Black et al* v. *Ehrich et al.*, 44 Fed. 792 (1891); *In re Page Company, supra; Ex parte Reinhold Publishing Corporation*, 68 USPQ 401 (Com'r. 1946), and *Ex parte Simmons-Boardman Publishing Corporation*, 77 USPQ 660 (Com'r. 1948).

OTHER ARGUMENTS.

Appellant urges that since the copyright laws do not protect the titles of books, if the Patent Office will not grant any protection on the name or title "then the applicant is without recourse even under the Constitution of the United States, which provides that patentees and authors *shall* be entitled to *protection* on their respective

works." Elsewhere it is alleged that this supposed failure of the law "appears to be a violation of" the Constitution.

Article I, Section 8, eighth clause, of the Constitution, to which we are referred, does no more than grant power to Congress to secure certain rights to authors and inventors insofar as it elects to do so. The cited clause grants no *rights* to authors and has nothing to do with the registration of trademarks. It is well known that the rights in book titles are afforded appropriate protection under the law of unfair competition. See Nims, "Unfair Competition and Trade-Marks," 4th Ed., Chapt. XVIII, especially § 277; Shoemaker, "Trade-Marks," Sec. 112 at page 325.

Appellant says, "The Patent Office does register trademarks for names or titles of *games*, which appears to be inconsistent with its holding that names or titles of books are not registrable." He then cites a number of examples together with the registration numbers and other data. We refrain from mentioning any of them so as not to reflect on the validity of registrations not before us, it being clear that we have not been supplied with sufficient information to enable us to say whether the words registered were legally entitled to be considered trademarks or were mere descriptive names which could not at the same time be trademarks. Having postulated this situation, however, appellant makes much of it in argument, one of his typical contentions being, "If games are registrable, and they are, books also should be registrable." Of course, neither games nor books are registrable but only trademarks.

The short answer to the last mentioned contention is that the decision of this case in accordance with sound law is not governed by possibly erroneous past decisions by the Patent Office. Suffice it to say that the same principles of law apply to the registration of trademarks for all kinds

of goods. If appellant were seeking to register TEENY-BIG as a trademark for a game the name of which was TEENY-BIG and it had no other possible descriptive name, our decision would be the same, and we trust it would have been the same in the Patent Office.

The decision of the Assistant Commissioner is *affirmed*.

AFFIRMED.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

In the Matter of the Application of Raymond K. Cooper.

October Term 1957
Patent Appeal No. 6329.
Patent Calendar No. 37.
Serial No. 653,815

WORLEY, *Judge*, dissenting.

I appreciate the detailed discussion in the majority opinion, but am not completely satisfied as to the correctness of the result reached therein. True, there is precedent, particularly in the *In re Page Company* decision, supporting the conclusion that the instant mark is not registrable, but it is also true that this court itself has provided support for the opposite view. For example, in *Whitman Publishing Company* v. *McLoughlin Bros., Inc.*, 25 C.C.P.A. (Patents) 1298, 38 USPQ 120, 97 F. 2d 608, this court quoted with approval the following language:

> *I can perceive no reason why a trade-mark may not properly be applied to a book*, or to a complete collection of books, just as it may be applied to a serial publication, or to any other article of merchandise.
> * * *
> * * * I think that trade mark ownership in a mark applied to books depends upon exactly the same considerations as those by which the question of ownership is determined with respect to marks applied to any other merchandise. *I can find no justification, either in law or in reason, for applying a different rule.* (Italics supplied.)

I readily concede the precise issue here was not present there, but the language is especially significant since it was approved after consideration of *In re Page*. That decision was handed down in 1917, long prior to enactment

of the Lanham Act, by the Court of Appeals of the District of Columbia. I respect the views of that court as "Those of a co-ordinate appellate court having, perhaps, approximately the standing" of this court in patent and trademark matters, and as such "they are persuasive and entitled to deference, but are not authoritatively binding."[1] In my opinion, the *Page* case is irreconcilable with the quoted language of the *Whitman* decision. I prefer to follow the latter, not necessarily because it is one of our own decisions but primarily because it is sound and consistent with the provisions of the Lanham Act.

I agree with the majority that "The sole question raised by this appeal is whether an arbitrary, that is to say coined, term which is the title of a book, and the only designation the book has, is registrable as a trademark for books under the Trademark Act of 1946, also known as the Lanham Act."

The only provisions of that act germane to the instant issue are:

> Sec. 2. *Trademarks registrable on the principal register.*
>
> No trademark by which the goods of the applicant *may be distinguished* from the goods of others shall be refused registration on the principal register on account of its nature unless it—(Italics supplied.)
>
> * * * * * * *
>
> (e) consists of a mark which, (1) when applied to the goods of the applicant is *merely descriptive* or deceptively misdescriptive of them, * * *; * * * (15 U.S.C. 1052). (Italics supplied.)

It does not seem to me that a reasonable interpretation of the above language would prohibit registration of the instant mark. First, it is obvious, as the majority concedes, that the mark is an "arbitrary, that is to say coined

1. *Watson* v. *Allen*, App. D. C., April 3, 1958.

term "* * *." As such it would seem to fully satisfy the first requirement of the Act with respect to its capability of distinguishing appellant's goods from the goods of others. Second, how a mark can be considered "arbitrary" and at the same time "merely descriptive" is something I am unable to reconcile with the express provisions of subsection (e). While it is quite true that a trademark which was *originally arbitrary* may eventually *become descriptive*, that is not the case here.

Our late colleague, Judge Cole, once observed that "Trademarks exist in a practical world * * *."[2] Broadly speaking, I think that statement captures the spirit of the Congressional intent as reflected in the report of the Senate Committee on Patents (Senate Report No. 1333, May 14, 1946) which accompanied the Lanham Act:

> The purpose of this bill is to place all matters relating to trade-marks in one statute and to *eliminate judicial obscurity, to simplify registration and to make it stronger and more liberal*, to *dispense with mere technical prohibitions, and arbitrary provisions, to make procedure simple*. * * *.
>
> * * * * * * *
>
> The purpose underlying any trade-mark statute is twofold. One is to protect the public so it may be confident that, *in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get*. * * * (Italics supplied.)

If the test employed in rejecting the instant mark is a proper and valid standard, then it should be consistently applied. That such does not appear to be the case is best illustrated by reference to but a few registered trademarks encountered daily, such as "Mercurochrome," "Coca-Cola" (also registered as "Coke"), "Mentholatum," "Pepto-

2. *Burton-Dixie Corp.* v. *Restonic Corp.*, 43 C. C. P. A. (Patents) 950, 234 F. 2d 668, 110 USPQ 272.

Bismol," "Bufferin," "Anacin," "Absorbine, Jr.," and "7 Up." Suppose, for example, a buyer wants a bottle of "7 Up." How can he identify what he wants without calling for it by name—the only name it has and the only name he knows? What other name did it have at the time of registration? Would not the same also be true of a multitude of other popular marks? Then why should a different standard govern the instant mark? How can a purchaser identify "Teeny-Big" without asking for it by name—the only name it has and the only name he knows?

In addition to the above, counsel for appellant cites numerous names of games which have been registered, among which are "Parcheesi," "Bingo," "Indian Checkers," "Galloping Dominos," and "Monopoly." It seems appropriate to wonder by what test those marks were passed for registration, and to inquire how they, any more than "Teeny-Big," can be identified by any other name.

It does not seem consistent to grant trademark protection for titles of periodicals, comic strips, and books in series yet deny protection to the arbitrary title of a single book. For example, "The Saturday Evening Post" is a registered trademark, although obviously it is the name and the only name by which that periodical can be identified. There, as here, trademark registration does not cover the *contents*, but merely the *title*. The contents of the Post, if copyrighted, would enter the public domain upon expiration of the copyright protection; however, the trademark under which the contents were published would not be available to the public, but would remain with the publisher. Would that not also be true here? In that connection, the following language in the majority opinion is interesting:

> There is a compelling reason why the name or title of a book of the literary sort cannot be a trademark. The protection accorded the property right in a trademark is not limited in time and endures for as long

> as the trademark is used. A book, once published, is protected against copying only if it is the subject of a valid copyright registration and then only until the registration expires, so eventually all books fall into the public domain. The right to copy which the law contemplates includes the right to call the copy by the only name is has and the title cannot be withheld on any theory of trademark right therein.

I trust I do not do the majority an injustice in construing that language to indicate that they have been influenced, at least to some extent, as I think was also true in several of the cases cited below, by the provisions of the Copyright Act, an act over which this court has no jurisdiction.

It seems there is an underlying fear on the part of the majority that registration of the instant mark would provide *permanent protection* of the contents of the book. However, I do not see that registration of the instant *title* would carry with it any greater degree of protection of the *contents* than is the case with respect to the title of a series of books or periodicals.

It is a matter of common knowledge that millions are spent in an effort to educate the public to ask for products *by a particular name*. I think Congress intended to encourage, not retard, those efforts when it enacted the Lanham Act. I not only fail to see what registration of the instant mark would result in any violence in the trademark world, but, on the contrary, feel that its registration would be clearly consistent with the provisions of that Act.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

October Term, 1957.

April 14, 1958.

In the Matter of the Application of Raymond K. Cooper. } Patent Appeal No. 6329.

Subject Matter: Trademark for books.

Serial No. 653,815.

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

Ordered that the decision of the Commissioner of Patents be, and the same is hereby, affirmed.

I, Cabell N. Pryor, Clerk of the United States Court of Customs and Patent Appeals, do hereby certify that the above judgment and the attached opinion are true and correct copies of the judgment and opinion of said United States Court of Customs and Patent Appeals filed the 14th day of April, A. D. 1958, in the above-entitled appeal, as the same remain upon the files and records of said court.

Witness my hand and the seal of this court this 3rd day of June, A. D. 1958.

(Signed) CABELL N. PRYOR,

Clerk.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

Washington 25, D. C.

May 23, 1958.

Mr. John A. Marzall,
Marzall, Johnston, Cook & Root,
135 South LaSalle Street,
Chicago 3, Illinois.

Re: Ex parte Raymond K. Cooper
Patent Appeal No. 6329.

Dear Sir:

This is to advise you that the court today denied the petition of appellant for rehearing in the above-entitled appeal.

Very truly yours,

CABELL N. PRYOR,
Clerk.

CC: Mr. Clarence W. Moore,
Solicitor for the Patent Office,
Washington 25, D. C.

Aug. 21, 1958.